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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 238

MARTIN ERRECA; AND BERNARD F. GAVIN AND GEORGE D. COLEMAN, ADMINISTRATORS OF THE ESTATE OF THOMAS J. GAVIN, Deceased,

Plaintiffs and Petitioners,

vs.

THE UNITED STATES,

Defendant and Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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MARTIN ERRECA; AND BERNARD F. GAVIN AND GEORGE D. COLEMAN, ADMINISTRATORS OF THE ESTATE OF THOMAS J. GAVIN, Deceased,

Plaintiffs and Petitioners,

vs.

THE UNITED STATES,

Defendant and Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

The petitioners, Martin Erreca; and Bernard F. Gavin and George D. Coleman, administrators of the estate of Thomas J. Gavin, deceased, plaintiffs in the action hereinafter mentioned, respectfully petition that a writ of *certiorari* issue out of this Court directed to the Court of Claims of the United States requiring that the cause entitled "*Martin Erreca; and Bernard F. Gavin and George D. Coleman, administrators of the estate of Thomas J. Gavin, Deceased,* Plaintiffs, vs. *The United States,* Defendant", No. 46247 in the records of the Court of Claims of the United States, be certified to it for review and determination of all errors assigned.

The judgment in said cause was dated the 5th day of April, 1948, and became final by the denial of a new trial on June 1, 1948.

The official report of the opinion delivered in the Court of Claims is found in 109 Ct. Cl. —, 76 F. Supp. 87.

Summary and Short Statement of the Matter Involved

The case sought to be reviewed is one of eight cases consolidated for trial in the Court of Claims and all brought to recover compensation for the taking by the United States, in connection with the Central Valley Project, of the riparian rights of the lands of the petitioners. In all of the consolidated cases, except the case here sought to be reviewed, the Court of Claims decided all questions of law and fact in favor of the petitioners and in the case sought to be reviewed decided all questions of law and fact in favor of petitioners, except the question as to the legal effect of the "reservations, conditions and exceptions" contained in the contracts and deeds between Miller & Lux Incorporated and the petitioners. In that connection the petitioners contended that such reservations read in the light of the surrounding circumstances only reserved the then-existing rights of Miller & Lux Incorporated, and they now contend that the Court of Claims in its *findings of fact* found that such was the intent of the instruments. Still, the Court of Claims in its *opinion* extended those reservations beyond all the rights owned by Miller & Lux Incorporated to rights which it, or its successors, might thereafter acquire in and to all the water of the San Joaquin River, including the water taken by the government for carrying out its project.

Basis upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment in Question

This Court has jurisdiction to review the judgment under 28 U. S. C. A., Section 288(b).

Reasons Relied On for Allowance of Writ

1. Petitioners claim that the Court of Claims so far departed from the accepted and usual course of judicial pro-

ceedings as to call for an exercise of this Court's power of supervision in that in its *findings* it found as a fact the intention of the instruments involved in accordance with the contention of petitioners, but in its *opinion* interpreted the instruments in accordance with the contention of the government, in violation of the rule that the judgments of the Court of Claims must be based upon and supported by the *findings of fact* and cannot be supported merely by the Court's *opinion*.

United States v. *Causby*, 328 U. S. 256, 90 L. Ed. 1206.

2. Petitioners contend that the decision of the Court of Claims is contrary to the fundamental rule that a reservation of rights only reserves existing rights and not future rights, and in extending the scope of the reservation to future rights the Court of Claims decided an important question of local law in a way in conflict with applicable local decisions.

The Questions Presented

The questions presented are the same as the two questions above set forth as the reasons relied upon for the allowance of the writ.

Attached hereto is a brief in support of said petition.

Wherefore, said petitioners pray that a writ of certiorari issue out of this Court directed to the Court of Claims of the United States and that upon the record certified by said Court of Claims of the United States the said judgment be reversed, and petitioners be given such other and further relief as may be meet in the premises.

EDWARD F. TREADWELL and
REGINALD S. LAUGHLIN,
Attorneys for Petitioners.

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ONE

The Court of Claims erred in finding in its FINDINGS OF FACT *the intent of the instruments in question in accordance with the contention of petitioners, and in its* OPINION *interpreting the instruments in accordance with the contention of the government.*

The petitioners, in their petition in the Court of Claims, set forth *in haec verba* the language of the reservation here involved, as follows:

> "The land above described is riparian to Mariposa Slough and other sloughs, and purchaser shall have a right to make a reasonable use as a riparian owner and in common with lower riparian land (including that of seller) of any water which may at any time be actually flowing in said sloughs as the same passes said above-described land. It is expressly understood and agreed, however, that the seller reserves the right to store, impound, divert, and use all or any part of the waters of the San Joaquin River and its tributaries, whether naturally flowing therein or being therein, after being stored or used by third persons at any point or points above the land herein agreed to be conveyed, and use the same for the irrigation of riparian or nonriparian lands, whether within or without the watershed of said River, and/or for the production of hydroelectric power. The rights herein reserved may be transferred to and exercised by the United States of America, the State of California, or any of their agencies, any public district, private or mutual water company, firm, or individual, to which seller may transfer or assign said rights. These re-

served rights shall constitute an easement in said lands so agreed to be conveyed and the riparian rights thereto." (R. pp. 12-13.)

In their petition, however, petitioners also alleged in detail certain facts surrounding the instruments in question and alleged that the intent of the instruments was to reserve merely the existing rights of Miller & Lux Incorporated (R. p. 14). The Court of Claims by Finding 72 found:

> "At the time of entering into the agreements Miller & Lux, Incorporated, was the owner of large tracts of land riparian and nonriparian to the San Joaquin River and its tributaries which it had theretofore irrigated with the waters of the San Joaquin River. At such time Miller & Lux, Incorporated, was subdividing its land for sale in small parcels and *intended to provide for the future irrigation of such land with the rights which it then owned* by means of public districts, private or mutual water companies, firms, or individuals to which it might assign said rights. At the time of entering into such agreements Miller & Lux, Incorporated, owned certain lands riparian to the San Joaquin River situated above the lands of all the plaintiffs herein, and also had made certain appropriations of water of the river on lands situated above the lands of such plaintiffs, but it owned no right to store any water of the river at Friant, nor did it own any right to store any water of the river elsewhere." (Finding 72, R. p. 84.) (Italics added.)

In the opinion of the Court of Claims, however, this language is used:

> "At the time the deeds were executed Miller & Lux had acquired the right to divert at points above the land conveyed and to use a part of the waters of the San Joaquin River and to use these waters for the irrigation of riparian and nonriparian lands, and they evidently intended to retain these rights notwithstanding the conveyance to plaintiffs Martin Erreca et al.

> But the reservation went further than this. It not only reserved the right to divert the water which they had already been diverting, but they further reserved the right to 'store, impound, divert and use all or any part of the waters of the San Joaquin River • • •' • • •
>
> "It would seem, therefore, that Miller & Lux, Inc., intended to do something more than merely reserve their existing rights." (Opinion 3(b) R. pp. 99-100.)

We submit that we were entitled to a *finding* as to the meaning and effect of these reservations. The Court made a *finding* that the intent of it was to reserve existing rights. There was no *finding* that they were intended to reserve future rights to store and impound all the water of the river. It is well settled that this Court, in reviewing the case will only consider the *findings* in order to determine the facts in the case. *It cannot consider the opinion of the Court for the purpose of arriving at the facts and if the findings of fact do not sustain the judgment it will be reversed irrespective of what may be contained in the opinion.*

United States v. *Causby*, 328 U. S. 256, 90 L. ed. 1206.

Two

The Court of Claims, in concluding in its opinion that the reservations not only reserved the existing rights of Miller & Lux Incorporated, but also reserved to Miller & Lux Incorporated or its successors the right to store and divert all the water of the river, violated fundamental rules for the construction of reservations and rules established by the courts of California.

I

The Words "Reserve" and "Reservation" Indicate a Protection of Existing Rights Rather Than of Future Rights

In its Opinion, p.100, the Court of Claims observes:

> "The condition of the deed reads, the grantor 'reserves' the right. This word means to keep or retain;

> that is to say, to keep what one already has. You do not reserve a right which you do not possess * * *".

At the time when the contracts were entered into and the deeds were executed, Miller & Lux had certain well-established rights, known to both parties, in the waters flowing past the land involved in the case of Martin Erreca et al. What appropriations Miller & Lux might try to make in the indefinite future was wholly in the realm of speculation. The reasonable interpretation to be given to a clause by which the grantor "reserves" to itself certain rights is that it is reserving those known, defined rights which it already has. The function of a "reservation," as the Court aptly observes, is "to keep what one already has"; to reserve to the grantor some estate or interest *out of the estate granted.* A "reservation" does not reach outside the estate granted to create something new in favor of the grantor. "You do not reserve a right which you do not possess."

This interpretation of the word "reserve" finds ample support in the declarations of other courts:

> "A reservation is always something which is taken back out of that which is clearly granted."
>
> *Craig* v. *Wells,* 11 N. Y. 315.

> "A reservation in a deed must not only be, as hereinbefore pointed out, of something which would otherwise, by operation of the terms of the deed, be conveyed, but it must necessarily be of something which belongs to the grantor at and before the execution of the deed. Property cannot be conveyed by reservation."
>
> *Barataria* v. *Ott,* 84 Miss. 737, 37 South. 121.

"In general, a reservation, like an exception, is something to be deducted from the thing granted, narrowing and limiting what would otherwise pass by the general words of the grant."

Dyer v. *Sanford*, 9 Metc. 395, 43 Am. Dec. 399.

"A reservation or exception can only be out of the estate granted."

Hill v. *Cutting*, 107 Mass. 596.

"• • • a reservation in a deed does not create or enlarge the vested rights of a grantor, but merely reserves the specific interest named therein from the operation of the grant."

Village of Terrace Park et al. v. *Errett*, 12 F. (2d) 240.

The grantor cannot by reservation create in himself an interest or estate in property which he does not own at the time of the conveyance.

Chidester et al. v. *City of Newark et al.*, 31 F. Supp. 892;

Mott v. *Nardo*, 73 C. A. (2d) 159; 166 P. (d) 37;

Powell v. *Big Horn Low Line Ditch Co.*, 81 Mont. 430, 263 P. 692.

II

The Word "Rights" Indicates Existing, Vested Rights, Not Future Expectancies or Indefinite Possibilities

Throughout the provision under consideration, the interest retained by Miller & Lux is described as the "right" or "rights" retained. Nowhere in the reservation are there words of futurity, referring to interests thereafter to be acquired or appropriations to be made at some indefinite future time. A "right" is a present, existent interest,

and the only "right" or "rights" to which a reservation could in ordinary English usage apply are those rights which the grantor owned at the time of the contract or conveyance. Miller & Lux had no "rights" to be retained by it beyond the existing privileges enjoyed by Miller & Lux and its subsidiaries, of using all of the flow of the San Joaquin and its tributaries at certain seasons of the year and part of the flow at other seasons, and certain rights under its contracts with the power companies. The balance of the water in the river had been withdrawn by the State from appropriation; it was not subject to any "rights" in Miller & Lux at the time when these reservations were drawn.

The word "right" is not a term which indicates a mere future expectancy. A "right" is that interest which a person actually has in any subject of property, entitling him to enjoy it or convey it at pleasure (*Haskins* v. *Ryan*, 71 N. J. Eq. 575, 64 A. 436). A mere expectancy is not a "right". (*Jeffers* v. *Lampson*, 10 Ohio St. 102). A prospective right is not a "right". (*Southern Pacific R. R. Co.* v. *U. S.*, 189 U. S. 447, 47 L. Ed. 896).

III

The Granting Clause Granted Certain Riparian Rights; If the Reservation Is Construed So Broadly as to Destroy All of the Riparian Rights Granted, It Is Repugnant to the Grant, and Void.

The paragraphs from the contracts of sale and deeds which are before the Court for interpretation (R., pp. 12-13) have been referred to by the Court and by the parties, for convenience of reference, as constituting "reservations." Actually, these paragraphs include two

separate operative parts: A *granting clause* conveying certain described lands and riparian rights, and a *reservation* retaining for Miller & Lux certain rights in the riparian rights conveyed.

The granting clause provides:

> "The land above described is riparian to Mariposa Slough, and purchaser shall have a right to make a reasonable use *as a riparian owner* and in common with lower riparian land (including that of seller's) of any water which may at any time be actually flowing in said Slough as the same passes said above-described land."

This provision certainly indicates that the land not only had riparian rights prior to its conveyance, but that it would continue to have such rights in the hands of the grantee. This is entirely inconsistent with the thought that the grantor intended to retain the right to destroy completely the very riparian rights being granted. The grantor did not purport to give a mere revocable license to use the water of the river; the words were "purchaser shall have a *right* • • • ". How could the purchaser, in common with lower riparian owners, have a *right* to enjoy the water of the stream if no riparian rights were conveyed to him or if the grantor could at will destroy the riparian rights? The grantee is entitled to use the water "as a riparian *owner* • • • ". What does the grantee "own", if we say that the grantor may at will destroy the riparian rights conveyed with the land?

The rights conveyed are to be used "in common with lower riparian land (including that of seller's)"; in other words, this was a "correlative right," enjoyed by the several riparian owners. This is a further recognition that the land conveyed was to continue to have riparian rights like those appurtenant to other riparian land, to be enjoyed

in common with the lower riparian owners. Others of the lower riparian owners have been expressly found by the Court to have established property rights in the waters of the river and its sloughs, subject only to the *existing* rights of Miller & Lux at the time of the conveyances to them. This would tend to indicate that Martin Erreca who was to use this water "in common" with the lower riparian owners, was to be placed on the same footing.

The language of the granting clause makes it clear that Martin Erreca as grantee was to have a *right, as a riparian owner,* in common with other riparian owners, to the waters flowing in Mariposa Slough. This right was not absolute. It was, as already noted, subject to correlative rights in lower riparian owners. And, by the terms of the reservation, it was subordinated to certain rights reserved to Miller & Lux. The reservation provided:

> "It is expressly understood and agreed, however, that the seller reserves the right to store, impound, divert, and use all or any part of the waters of the San Joaquin River and its tributaries, whether naturally flowing therein, after being stored or used by third persons at any point or points above the land herein agreed to be conveyed, and use the same for the irrigation of riparian or non-riparian lands, and/or for production of hydroelectric power."

The reservation, like the grant, was in very general terms. Taken out of context, and with no consideration of the surrounding circumstanes, it might be claimed to mean that Miller & Lux reserved the right to appropriate all of the waters of the San Joaquin River and its tributaries, without any regard for the riparian rights of Martin Erreca or the other lower riparian owners. But such an interpretation would disregard one of the purposes of the grant, which was to convey to the grantee some riparian rights appurtenant to the land conveyed. Such an interpreta-

tion would entirely destroy the effect of the grant, and would leave the land conveyed with *no* vested water rights. A reservation so broad that it nullifies the grant is itself void, as being repugnant to the grant. (6 Thompson on Real Property, Sec. 3471; *Horticultural Development Co.* v. *Lark,* 224 Ala. 193, 139 So. 229; *Pynchon* v. *Stearns,* 11 Metc. (52 Mass.) 312, 45 Am. Dec. 210; *Cutler* v. *Tufts,* 3 Pick. (20 Mass.) 272).

But the reservation here need not be held void for repugnancy. If there is a reasonable basis for giving the reservation a more restricted meaning—thus leaving something to pass by the grant—that more restricted meaning should be adopted so that the reservation may be given effect. (*Foster* v. *Runk,* 109 Pa. 291, 2 A. 25; *Dunham* v. *Kirkpatrick,* 101 Pa. 36, 47 Am. Rep. 696.)

From the facts of record, that more restricted meaning is easily determined. At the time of these conveyances Miller & Lux and its subsidiaries had established riparian, appropriative and prescriptive rights to a large part of the flow of the San Joaquin and its tributaries: A maximum of 1,458,538 acre feet, before Erreca and other riparian owners became entitled to the use of any of the water of the San Joaquin. (Special Finding 21, R. p. 40.) At certain times, these prior riparian, appropriative and prescriptive rights required *all* of the water in the river, at other times only a portion of it. (Special Finding 25, R. pp. 43-44.) Naturally, Miller & Lux, in conveying land to Erreca, with the riparian rights appurtenant thereto, did not intend to destroy these prior appropriative and prescriptive rights. What Miller & Lux did intend to do, and what it did by the reservation, was to retain the *existing* riparian, appropriative and prescriptive rights to use all or a portion of the waters of the rivers, according to the seasonal flow.

This interpretation gives effect to *both* the grant and the reservation. Even with the prior riparian, appropriative and prescriptive rights reserved and excluded from the grant, the riparian rights appurtenant to the land conveyed were of substantial, measurable value, amounting to $9.00 per acre, and provided an important part of the consideration for the purchase price paid by Erreca. It is entirely consistent with the language and basic intent of both the grant and the reservation to view the *grant* as vesting in the grantee the *right* to enjoy the high water during spring floods, while the *reservation* retained for Miller & Lux all prior riparian, appropriative and prescriptive rights. The reservation, thus interpreted, modifies the grant but does not destroy it; it is not repugnant to the grant.

IV

All Provisions of the Contracts and Deeds Should Be Harmonized If Possible, and All Parts Given Effect; This Can Only Be Done by Interpreting the Reservation as Applying Only to the Existing Rights of Miller & Lux.

It is a basic rule in the construction of contracts and other instruments that all of the provisions of the contract or other instrument should be construed together and given effect (Cal. Civil Code, Sec. 1641). One part of the instrument should not be seized upon, at the expense of other provisions; the intention should be derived from a consideration of the instrument as a whole, and all of the provisions harmonized to give effect to each.

Skookum Oil Co. v. *Thomas,* 162 Cal. 539, 123 Pac. 363;
City of San Diego v. *La Mesa etc. Irr. Dist.,* 109 C. A. 280, 292 Pac. 1082;
Turner v. *Cook,* 117 C. A. 399, 4 P. (2d) 182.

This rule applies to the construction of a reservation.

Moakley v. *Los Angeles Pac. Ry. Co.,* 139 C. A. 421, 34 P. (2d) 218.

The construction of the contracts and deeds which has been adopted by the Court in this instance has the effect of subordinating the grant of riparian rights completely to the reservation. Though the contracts and deeds purported to convey a *right* to Martin Erreca to use the waters flowing in Mariposa Slough, the reservation is seen as retaining in Miller & Lux *all* of the water of the San Joaquin and its tributaries, thus destroying the very right conveyed. The reservation is given a broader interpretation than is needed to effectuate the basic intention of the parties, while the granting clause is rendered meaningless.

This result is not necessary under the language used. The Court can *harmonize* the granting clause and reservation by interpreting the reservation as applying only to the *existing* rights of Miller & Lux, and the granting clause as applying to the *existing* riparian rights then appurtenant to the land conveyed. This interpretation, instead of destroying the granting clause in favor of the reservation, gives recognition to each of the provisions without doing violence to either.

V

The Court of Claims Gives Undue Importance to the Phrase "All or Any Part" of the Waters of the River; However Broad the Terms of the Reservation, It Could Not Operate On Rights Which Miller & Lux Did Not Possess; and Those Words Appropriately Described Rights Which It Did Possess.

In reaching the conclusion that Miller & Lux had by force of the reservation acquired the right to appropriate the entire flow of the river and destroy the grantee's riparian rights, the Court has, we respectfully submit, given undue weight to the phrase "all or any part of the waters of the San Joaquin River," and has misinterpreted its import.

The Court says (Op., par. 3(b), R. p. 100) speaking of Miller & Lux:

> "in the deed they reserved, as against the grantee, the right to appropriate 'all or any part' of the waters of the river * * *; that is to say, the riparian rights in the lands conveyed should be exercised in subordination to the right of Miller & Lux to appropriate the balance of the water in the river, not only the water already appropriated, but, in addition, 'all' the water of the river."

Such an interpretation must rely heavily on inference and implication; it does not result naturally from the language of the reservation. There is no express provision in the reservation authorizing Miller & Lux to appropriate additional water. Nor are there two separate provisions, one reserving present rights and another authorizing Miller & Lux to appropriate additional rights. The meaning of the reservation must be found in the single clause: "the seller reserves the right to store, impound, divert and use all or any part of the waters of the San Joaquin River and its tributaries * * *." Miller & Lux had, at the time of these conveyances, the very right described. It had the right, in low water seasons, to take *all* of the water in the river, and at times of flood to take *part* of the water. The words used were apt words to describe the *existing* rights of Miller & Lux. The Court has found, as to the *existing* rights of Miller & Lux and its subsidiaries (Special Finding 12, R. p. 33):

> "The diversions mentioned above were upstream from the lands described in plaintiffs' petitions and the parties to these actions do not dispute that the rights founded on these diversions and the use of the water so diverted are entitled to be satisfied out of the waters of the San Joaquin River before the plaintiffs in these four cases are entitled to the use of any waters of the San Joaquin River. Because of the variability of the

> flow, satisfaction of these rights and of other undisputed prior rights hereinafter mentioned require the entire supply of water in the river at certain times of the year, and at all times of the year in some years of exceptionally low water."

Seen in the light of the surrounding circumstances, the phrase "all or any part" is no more than a general description of the waters to which the existing riparian, appropriative and prescriptive rights of Miller & Lux extended. There is in the phrase, as thus explained, no basis for an implication that Miller & Lux intended to create in itself an *additional* right to appropriate all of the water of the river *at all times*, thus destroying the very riparian rights which it granted to Erreca.

It is common, in granting or reserving all forms of property, particularly incorporeal rights of an indefinite or variable nature, to describe the rights granted in general terms. It would have been wholly impractical in these contracts and deeds to describe by monthly flow or acre feet the exact extent of the riparian rights which were being granted to Erreca, and the prior riparian, appropriative and prescriptive rights which were being reserved to Miller & Lux, because the amount of water involved varied from month to month and year to year. The use of general words of description, however, does not have the effect of enlarging the estate granted beyond what the grantor owns at the time of the conveyance. Similarly, in the case of a reservation, general terms of description may be used, but they should be understood as applying only to the rights which the grantor possessed at the time of the conveyance.

For example, in *Rowland* v. *Lilly's Heirs*, 190 Ky. 757, 228 S. W. 448, one of two joint tenants conveyed to the other all of his right, title and interest in and to the joint property, reserving "all the minerals" and the right of

ingress and egress to and over the "said lands." This reservation was interpreted as reserving only a one-half interest in the minerals, since the grantor could not by reservation take out of the operation of the conveyance an interest to which she had no title.

Similarly, in *Hill* v. *Cutting*, 107 Mass. 596, tenants in common effected partition by exchanging quitclaim deeds, and one of them attempted to reserve for his own use all of the timber on a described tract of the land conveyed. It was said that this reservation could not operate on timber on the undivided half of the tract already in the other tenant in common, because a reservation or exception could only be out of the thing granted.

To the same effect is *Clark* v. *Pauley*, 291 Ky. 637, 165 S. W. (2d) 161, where a grantor owning a portion of an oil and gas tract purported to convey the entire tract and reserve to himself a life interest in the oil, gas and pipe line rights. The Court construed the reservation as applying only to that portion of the oil, gas, and pipe line rights which the grantor owned.

And in *Fatherree et al.* v. *McCormick et al.*, 199 Miss. 248, 24 So. (2d) 724, where there was a grant of land "less and except one-half of all mineral rights", but the grantor's interest did not extend to one-half the mineral rights, the reservation was held ineffective.

The phrase "all or any part" of the waters of the river was no more than a general description of the varying physical limits of the *existing* rights reserved. It was not intended to be, and under the authorities it should not be construed as being, a description of some new, additional right never previously in existence.

VI

The Reservation of the Right, to "Store" Water Is Consistent With the Intention to Reserve Only Existing Rights, as Certain Power Companies, Operating under Contract With Miller & Lux, Were Already Storing Water Above the Land Conveyed.

In concluding that more than the *existing* rights of Miller & Lux were covered by the reservation, the Court has relied heavily upon the reservation of the right to "store."

Actually, the terms of the reservation, read in the light of the surrounding circumstances, did not go beyond the existing rights of Miller & Lux. The reservation, rather, aptly described the established riparian, appropriative and descriptive rights then in existence and then being exercised by Miller & Lux, and its subsidiary corporations, and the power companies who were its assignees under prior contracts.

The right reserved was "to store, impound, divert, and use all or any part of the waters of the San Joaquin River and its tributaries * * *." Miller & Lux and its subsidiaries had the right, at the time of these conveyances, to "divert and use all or any part" of the flow of the river, according to the seasonal flow (Special Findings 9-13, R. pp. 32-34).

When Miller & Lux reserved the right to "store" and "impound" water the purpose was to protect its existing position under its numerous contracts with two power companies: Southern California Edison Company, Ltd., and San Joaquin Light and Power Corporation. For many years prior to these conveyances, these two power companies had constructed and maintained dams and reservoirs in the San Joaquin River above the lands here involved, stored water in the reservoirs and released and regulated the flow of the waters through a series of power plants.

Beginning in 1906, Miller & Lux and its subsidiaries entered into numerous contracts with the two power companies, or their predecessors, by which the power companies were authorized and required to store water of the San Joaquin River System during comparatively high stages of the flow, use the stored water for producing power, and return it to the river above the lands owned by Miller & Lux during lower stages of the flow *for the use of Miller & Lux* (Special Finding 14, Plff's. Ex. 43, R. pp. 34-35). These contracts were in effect a relinquishment or assignment by Miller & Lux (and its subsidiaries) of a portion of its riparian, appropriative and prescriptive rights in the waters of the river, and gave Miller & Lux a direct contract interest in maintaining the rights of the power companies to store and impound water. The *ownership* by Miller & Lux and its subsidiaries of the water stored and released under these contracts was one of the major questions involved in the "Haines" decree, and such ownership was upheld as against the contrary contention of Madera Irrigation District.

To avoid being in default under its existing contracts with the power companies, Miller & Lux was required to make any conveyance of its lower riparian lands and their appurtenant riparian rights subject to the existing rights of the power companies to "store" and "impound" the water of the river. This circumstance adequately explains the reservation of the right to "store" and "impound" the waters of the river, and negatives any idea that the reservation was intended to encompass any new, additional rights.

VII

The Provision That the Reserved Rights Should Be an Easement in the Lands Conveyed and in the Riparian Rights Thereto Is Consistent With the Interpretation That Miller & Lux Intended to Reserve Only Its Existing Rights.

The concluding sentence of the reservation states:

> "These reserved rights shall constitute an easement in said lands so agreed to be conveyed and the riparian rights thereto."

The Court of Claims appears to give some weight to this statement in arriving at the conclusion that the grantor intended to go beyond its existing rights and acquire additional rights. On the contrary, it is respectfully submitted, this provision is persuasive that the rights reserved were intended to be only the grantor's existing rights.

So far as the land conveyed was concerned, this provision added nothing to the legal effect of the instrument. Even without such a provision, a right to take water as against certain land is held to constitute an easement in the land (*St. Helena Water Co.* v. *Forbes*, 62 Cal. 182). But this provision went further and provided that the rights reserved would be an easement in the "riparian rights conveyed". Certainly this indicated that the land would continue to have riparian rights, notwithstanding the grantor reserved an easement in those rights. There cannot be an easement without a servient tenement, and the parties apparently visualized a riparian right in these lands which would be limited but not destroyed by an easement in those riparian rights. It would have been wholly inappropriate to describe the reserved rights as an "easement" in the riparian rights conveyed, if in fact no vested riparian rights were conveyed, or the grantor had the power to destroy the riparian rights at will.

If the scope of the reservation here is tested by the law of easements, it is immediately apparent that Miller & Lux did not reserve the right to destroy entirely the riparian rights which constituted the servient estate, but intended rather to retain limited rights of user as against those riparian rights.

It is common to create easements—whether by grant or reservation—in very general terms. The dominant owner is given "a right of way", "a right to lay pipes", "a right to take gravel". The extent of the user is generally not defined precisely, but that does not mean that the dominant owner may use the servient estate without limit, even to the extent of destroying it. There must be only a "reasonable" use, under the circumstances surrounding the conveyance, which will at the same time carry out the purposes of the grant and impose as little hardship as possible on the servient owner. The California courts have been particularly jealous of the rights of the servient owner, and particularly willing to keep for him the right to make the maximum use of the servient estate consistent with enjoyment of the easement.

Despite the broad terms of a grant or reservation, the scope of the easement is restricted to the use which the parties actually establish in practice. When the dominant owner exercises his rights in a certain way, and the servient owner acquiesces in such exercise, that use fixes and limits the scope of the easement, and the use cannot thereafter be expanded or increased by the dominant owner.

Winslow v. *City of Vallejo*, 148 Cal. 723, 84 Pac. 191;
San Joaquin & Kings River Canal & Irr. Co. v. *Egenhoff*, 61 C. A. (2d) 82, 141 P. (2d) 939;
Felsenthal v. *Warring*, 40 Cal. App. 119, 180 Pac. 67.

The rights actually exercised by Miller & Lux after the conveyances to Erreca showed what the parties intended by the terms of the conveyances and had the effect of defining

and limiting the scope of the easement reserved. It is of the greatest significance that Miller & Lux did not attempt, after the conveyances to Erreca, to assert any broader or greater rights than it had enjoyed for many years before the conveyances. It did not attempt to make additional appropriations. It did not increase the capacity of its diversions. The spring floods continued to flow over and enrich the land conveyed to Erreca without any hindrance from Miller & Lux beyond the exercise of its established riparian, appropriative and prescriptive rights. When Miller & Lux continued, after these conveyances, to exercise only the rights which it had been exercising for years (diversion of water for its own purposes and irrigation and sale, and storage and impounding of water by the power companies, as its assignees) that user defined the scope of its rights as precisely as if the details had been spelled out in the reservation. Thereafter, Miller & Lux had no right to expand its own rights, and it naturally followed that it had no right to convey, or attempt to convey, more extensive rights to the United States.

With the extent of the easement right defined both by a reasonable interpretation of the reservation and by the use which Miller & Lux practised under it, the servient owner had an unimpaired right to any use of the servient estate (the riparian rights) which would not conflict with the rights of Miller & Lux as so defined and limited.

City of Pasadena v. *California-Michigan Land & Water Co.*, 17 Cal. (2d) 576, 110 P. (2d) 983;
Brookshire v. *Casmalia*, 156 Cal. 211, 103 Pac. 927;
Colegrove Water Co. v. *City of Hollywood*, 151 Cal. 425, 90 Pac. 1053;
Hoyt v. *Hart*, 149 Cal. 722, 87 Pac. 569;
Dierssen v. *McCormack*, 28 C. A. (2d) 164, 82 P. (2d) 212.

"It is well settled, as a general proposition, that the owner of the servient estate may use his property in any

manner and for any purpose consistent with the enjoyment of the easement."

Hoyt v. *Hart*, supra.

"The law is jealous of the claim of an easement (19 Cor. Jur. 958) and likewise of the extent of the rights claimed under an instrument granting an easement. The rule is that every incident of ownership not inconsistent with the easement and enjoyment of the same, is reserved to the grantor."

Dierssen v. *McCormack*, supra.

The same reasoning would, of course, apply to the rights of the servient grantee, where the easement is created by reservation.

Thus, at the time when Miller & Lux purported to convey its interest in rights riparian to Erreca's land to the United States, it had only the rights which it had exercised over the intervening years, and these rights were all that it was entitled to convey. All other rights remained in Erreca up to the time of the taking by the United States by the building of Friant Dam.

VIII

The Circumstances Surrounding the Sale Show That Miller & Lux Intended to Reserve Only Its Existing Rights as Against the Riparian Rights Conveyed.

Probably the most significant circumstance to be considered in construing these instruments is the position of Miller & Lux at the time of the sales, and its course of dealings with Erreca and other purchasers of riparian land. The conclusion of the Court that Miller & Lux intended to reserve as against Erreca et al. new, additional rights, beyond its *existing* rights, cannot be reconciled with the Court's finding as to the intention of Miller & Lux in subdividing and selling its land. That finding (Special Finding 72, R. p. 84) we have already quoted on page 5 hereof.

This finding is of the greatest significance, because it is the sole finding of fact relating to the *intention* of Miller & Lux. There is no finding—and on the record herein there could be no finding—that Miller & Lux intended to reserve non-existent, future rights to irrigate the counties of Madera, Fresno, Kings, Tulare and Kern. As the Court aptly puts it, Miller & Lux "intended to provide for the future irrigation of such land *with the rights which it then owned* * * *". This finding is diametrically opposed to the idea that Miller & Lux intended to destroy the riparian rights conveyed with these parcels of land, and necessary for their irrigation, by making new, additional appropriations higher on the river for the irrigation of lands in those counties not owned by it.

It is true, as the Court finds, that at the time of these conveyances Miller & Lux, *itself*, "owned no right to store any water of the river at Friant, nor did it own any right to store any water of the river elsewhere." It should not be concluded from this finding, however, that the reservation by Miller & Lux of the right to "store" and "impound" water was intended to encompass new, nonexistent rights. As is fully explained above (VI, pp. 18-19) two assignees of Miller & Lux, Southern California Edison Co., Ltd. and San Joaquin Light and Power Corporation, did have *existing* rights under contract with Miller & Lux, to "store" and "impound" for the benefit of Miller & Lux, and the right to "store" and "impound" was reserved in order to protect these *existing* rights.

The sales to Martin Erreca here involved did not constitute isolated transactions, but were part of a larger plan, described in Special Finding 72, of subdividing a large tract of land into parcels and selling the riparian lands with the riparian rights appurtenant thereto. In order to determine the meaning of the contracts and deeds here under construction, the Court should also look at the other con-

tracts and deeds executed by Miller & Lux with respect to other parcels of land similarly situated and sold as part of the same general scheme of subdivision.

Deed to J. Sheldon Potter (Claim No. 46245), dated November 30, 1935.

The history of the deed from Miller & Lux to J. Sheldon Potter (*J. Sheldon Potter* v. *U. S.*, No. 46245, R. p. 119-20), which was made at about the same time as the contracts here under consideration and as a part of the same series of land sales, shows clearly that the purpose of Miller & Lux in reserving the right to "store" and "impound" water in deeds to its several grantees was to protect the existing rights of the power companies with which it had contracts.

The deed which Miller & Lux first offered to Potter reserved the right to "store and impound" water in very general terms (Special Finding 52, R. p. 68):

> "Grantor reserves the right to store and impound at any point or points above the land herein conveyed all or any part of the water flowing in the San Joaquin River, or any of its tributaries * * *."

When Potter refused to accept the deed with this and other provisions, Miller & Lux offered a deed which spelled out in more explicit terms the rights which Miller & Lux intended to reserve. This deed (Special Finding 51, R. p. 67) provided in part:

> "This conveyance is made subject to the following conditions, covenants, and reservations:
>
> (1) To all existing water rights of the Grantor and its subsidiary companies * * * whether established by appropriation, prescription, or existing contract, and the right of the Southern California Edison Company, Ltd., and the San Joaquin Light & Power Corporation to store the water of the San Joaquin River under existing contracts with the Grantor.

(2) To the right of Grantor and said subsidiary companies to sell and convey any water right already established in it or them, by appropriation or prescription, in or to the waters of the San Joaquin River or its tributaries * * * and to store and/or change the place of use of such water, whether within or without the watershed of said river * * *."

The substitution of the new provisions in the deed to Potter was a *clarification* of the intention of Miller & Lux, rather than a new and different transaction. Potter paid for his land, under the new deed, the price which had been previously agreed upon, and there was no suggestion in his dealings with Miller & Lux that they were making a new deal or a special concession in his case.

The second Potter deed is significant in two respects:

1. It shows that there was in existence at the time of the conveyance a right of storage which Miller & Lux desired to protect: The right of the power companies to store under existing contracts with Miller & Lux.

2. It showed that Miller & Lux did not intend, in making the reservations in its several deeds, to reach out for new, additional rights, but was merely attempting to protect *existing* rights of storage which were long established.

Similarly, the reservation in the deed to Erreca of the right to "store" and "impound" water is no basis for an inference that Miller & Lux was reaching out for new, additional rights. The right to "store" and "impound" was long-established, and it was this *existing* right of storage which the reservation was intended to protect.

Deeds to Martin Erreca, sole (Claim No. 46244) dated October 20, 1937, and to predecessors of Gerlach Live Stock Company (Claim No. 46009), dated June 20, 1935.

The reservation clauses in these two deeds are identical. So far as pertinent here, they provide:

> "This conveyance is made on condition that the riparian rights of the land herein conveyed shall always remain and be exercised subject and subordinate to the water rights of the Grantor * * * whether such water rights be riparian, appropriative, or prescriptive, to the end that the Grantor * * * may use, enjoy, and transfer said water rights, including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the Grantee, his heirs, and assigns. This covenant and conditions shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the Grantor, * * * against the Grantee, his heirs and assigns, to the extent herein provided." (Special Finding 59, R. p. 73).

In the opinion of the Court of Claims herein it is stated:

> "By this exception it was plainly intended to reserve to the grantor its existing water rights." (Opinion, par. 3(c), R. p. 101).

The Court of Claims suggested that the clause "including the right to contract for or permit storage on the upper reaches of the San Joaquin River, without let or hindrance from the grantee, his heirs, and assigns" might be construed to include the right to enter into additional contracts for "storage on the upper reaches of the San Joaquin River." The Court did not consider it necessary to decide this matter. We respectfully submit that the natural, reasonable construction of the language used is that it referred to the *existing* rights of the power companies to store for power, high on the river and its tributaries, and could not reasonably refer to storage at Friant Dam for the irrigation

of the counties of Madera, Fresno, Kings, Tulare and Kern. Friant Dam is on the edge of the San Joaquin Valley, practically on the floor of the valley. The power reservoirs are at elevations between five and ten thousand feet.

The word "reaches" means nothing more than some stretches of the river. The word "upper" is clearly relative and means "higher" in elevation or on the course of the river. While it clearly was intended to limit this storage to some place which the parties intended to be expressed by the words "upper reaches," if they referred to future storages, the contract contains no data from which the particular reaches can be located. This is demonstrated by the fact that the expression standing alone is equally applicable to reaches

(1) above tidal action;
(2) above plaintiffs' land;
(3) above Miller & Lux land;
(4) above the floor of the valley;
(5) above the foothill area;
(6) above the snow line;
(7) above the timber line;
(8) above the junction of the snowfed tributaries (North Fork, South Fork, and Middle Fork) with the main channel.

On the other hand, if the parties understood that these words applied to existing storages, the expression had certainty and was descriptive of the actual location of such storages, and the validity of the contract was saved by the rule that that is certain that can be made certain.

The language used does describe aptly the storage maintained by the power companies at their reservoirs, for the benefit of Miller & Lux, and it is this storage to which the reservation naturally applies.

Deed to Gerlach Live Stock Company.

The language of this deed is set forth in Finding 78, R. p. 109, and with respect to it the Court of Claims concluded that it only reserved the existing rights of Miller & Lux (Opinion, par. 3(c), R. p. 122).

All of these deeds and contracts were part of the general scheme of subdivision and sale of its lands by Miller & Lux, described by the Court in Special Finding 72, R. p. 84. While the language differs, they all follow the same general pattern and show a general, pervading intention. That intention was to convey with each of the parcels sold the riparian rights appurtenant thereto, but to reserve to Miller & Lux the existing riparian, appropriative and prescriptive rights which it enjoyed in the water of the San Joaquin and its tributaries, including the storage rights which it had assigned to the power companies on the upper reaches of the river.

Since all of the riparian rights conveyed to the several grantees were *correlative* rights, to be enjoyed in common by the several grantees, Miller & Lux could not possibly have hoped to gain any substantial advantage by reserving as against Erreca the right to make additional appropriations, when its intention clearly was in all of the other conveyances—and the Court of Claims has so found—to reserve only its existing rights. All of the lands involved in these several conveyances were moistened and enriched by the same general flow of water (Special Finding 28, R. p. 46. Miller & Lux could not interfere with that flow, or make further appropriations against it, without violating the vested, recognized rights of its other riparian grantees. It is not reasonable to suppose that Miller & Lux intended to reserve as against Martin Erreca, alone of all its grantees, a right to make future appropriations which it could not legally make, because of the other riparian rights which it granted.

Seen as a separate transaction, the sale of the parcels of land here involved to Martin Erreca cannot be understood properly, and the terms of the contracts and deeds are ambiguous and uncertain. But the Court is entitled to consider all of the surrounding circumstances, among the most important of which are these other sales made at about the same time, as part of the same general pattern. The intention of Miller & Lux throughout its sales program is clear: To convey the riparian rights with each parcel sold, but to retain its *existing* riparian, appropriative and prescriptive rights. Where the purchaser did not consider this intention clearly expressed, the language was clarified to make it clear.

IX

It Could Not Have Been Intended That Miller & Lux Was to Make New Appropriations of the Water for the Irrigation of Lands in Madera, Fresno, Kings, Tulare and Kern Counties, Because All the Surplus Water Had Been Covered by Filings of Madera Irrigation District Transferred to the United States, and the Legislature of California Had Provided for the Appropriation by the Department of Finance of All Waters Necessary for the Central Valley Project and All Such Water Had Been Filed Upon.

The Court is not restricted in considering the surrounding circumstances to the circumstances prevailing at or before the time when the contracts and deeds took effect. It is also proper to consider the "practical construction" which the parties put upon the instruments by their own conduct under them. So far as Miller & Lux was concerned, there is no evidence that from the date of the contracts with Erreca to the present time it ever made any appropriation of water or applied to the Division of Water Resources of the State of California for the right to make further appro-

priations for the benefit of the counties named. In other words, it never did anything that indicated any understanding on its part that it had the right to appropriate all of the water of the river, in excess of its existing rights.

As a physical matter, Miller & Lux could not have made any further appropriations without constructing very expensive installations for the control of the flood waters of the river. It must be remembered that Miller & Lux already had under existing riparian, appropriative and prescriptive rights the right to use *all* of the waters of the river at slack periods. Only during the winter or spring floods was there an excess to benefit lower riparian lands. The Court has expressly found (Special Finding 31, R. p. 48) that the upper riparian land of Miller & Lux could not benefit further from the spring floods in the absence of controlled diversion, and that installations for such diversion had never been constructed or planned. Indeed, there is no evidence of record that Miller & Lux had ever planned the installation of works to make additional appropriations for any purpose.

As a legal matter, Miller & Lux could not have made additional appropriations, because the entire flow of the river had already been subjected to prior appropriations. Madera Irrigation District had in 1916, 1919, and 1922 filed applications for appropriation which aggregated 15,000 second feet of flow and 1,600,000 acre feet of storage, far more than the surplus of water available for appropriation (Special Finding 16, R. p. 37). These applications were assigned to the United States on January 29, 1940.

Further, the California Legislature had as early as 1927, in aid of the Central Valley Project, authorized the State Department of Finance to file application "for any water or the use thereof which in the judgment of the state department of finance is or may be required in the development and completion of the whole or any part of a general or co-

ordinated plan looking towards the development, utilization or conservation of the water resources of the state" (Stats. of Cal., 1927, Ch. 286, p. 508, now No. 10500 *et seq.* of Water Code of California, amended by Stats. of 1931 Ch. 720, p. 1514, 1933 Ch. 537, p. 1425, 1935 Ch. 462, p. 1519, 1939 Ch. 685, p. 2199). The records of the Division of Water Resources, Department of Public Works, State of California, of which this Court may take judicial notice, show that on July 30, 1927, Applications 5637 and 5638 were filed by the Department of Finance pursuant to this statutory authority. These applications were for diversion at Temperance Flat Dam and involved 4,500 cu. ft. per second direct diversion for power and 5,000 cu. ft. per second direct diversion for irirgation, both specifying 1,210,000 acre-feet for storage. These amounts far exceed the maximum amount available for appropriation, over and above the outstanding riparian, appropriative and prescriptive rights, leaving nothing available for later appropriation by Miller & Lux or any other party.

Since Miller & Lux never showed any intention to spend the many millions of dollars which would have been necessary to appropriate the flood waters of the river, and after 1927 it could not legally appropriate them, it is respectfully submitted that Miller & Lux could not sensibly have intended, when selling land in 1935 and 1936, to reserve the right "to appropriate the balance of the water of the river, not only the water already appropriated, but, in addition, 'all' the water of the river" (Opinion, par. 3(b), R. p. 100).

X

The Circumstances Surrounding the Sales Show That Martin Erreca Paid For, and Understood That He Was to Receive, All of the Riparian Rights Appurtenant to the Land Conveyed, Subject to the Existing Rights of Miller & Lux.

In constructing these contracts and deeds, it is important to consider not only the intention of the grantor, but also the intention and understanding of the grantee. California Civil Code 1649 provides:

> "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."

Erreca's knowledge of common English, and his knowledg of the whole Miller & Lux sales program, indicated to him that his land was to have riparian rights and that Miller & Lux was reserving that which it owned, not some indefinite future rights which it did not own. The phrase "all or any part" of the waters of the river gave him no warning that Miller & Lux might claim more than its *existing* rights, because that phrase could be applied without any violence whatever to the *existing* rights which Miller & Lux had long exercised: The right to take "all" of the water in the river during slack seasons and "part" of the water during periods of flood.

Most important, Erreca *paid for* land with riparian rights attached. The land purchased by J. Sheldon Potter sold at about the same time, cost $25 per acre (Tr., p. 207). The United States and Miller & Lux have agreed that the value of riparian rights to uncontrolled grasslands—of which the land here involved was part—was $9 per acre (Special Finding 37, R. p. 55). The Court has expressly

found that the Potter land was subject only to the *existing* rights of Miller & Lux (Opinion, par. 3(a), R. p. 98).

Not only did he pay for the land with riparian rights attached, but after receiving his land Erreca showed consistently by his conduct that he understood that his land had established riparian rights. As shown by the findings (Special Findings 74 and 75, R. pp. 85-86) he improved and cultivated the land in reliance upon continuing riparian rights:

> "The lands involved in this claim were originally grasslands subject to the uncontrolled overflow of the San Joaquin River. During the period in which it owned the lands, Miller & Lux Incorporated commenced a program of bringing the lands under cultivation by building levees or dikes where required along the river and the sloughs to confine and control the flow of the water therein, and by leveling the land.
>
> "When plaintiff Erreca came into possession of the lands, he leveled and brought under cultivation additional acreage thereof, so that in 1941 approximately 70 percent was leveled land on which crops were grown. The remainder was pasturage."
>
> "During the spring flood seasons, hereinabove described, the San Joaquin River water flows down the main channel, past the Erreca land and through the sloughs across such land. Except in a year of extreme high flow, it is confined to the main channel and to the sloughs by means of levees or dikes and does not overflow the land. When the water is high in the main channel and in the sloughs, it seeps therefrom for a distance of approximately one-half mile. Plaintiff Erreca has promoted such seepage by the placings of checkdams in sloughs. During the years when there is no high water the crops are poor, but when there is high water the crops are good. Winter rains start the growth of pasturage, but the seepage is necessary to continue the growth. About two-thirds of the land is adversely affected when there is no seepage. For these reasons the land derives benefit from the spring floods of the San Joaquin River."

Thus Erreca, as grantee, consistently showed his understanding that he had purchased certain riparian rights appurtenant to the land. His course of conduct is much more pursuasive than any declarations could be. He paid for land with certain water rights attached, and he made expensive improvements which would not have been justified if the land had no vested riparian rights. His intention and understanding are perfectly clear: That the land which he purchased enjoyed riparian rights, subject only to the *existing* rights of Miller & Lux.

Conclusion

Petitioners respectfully submit that the writ should be granted.

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